Nos. 165 and 247.
Brf. of Rodey for D.

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(17,[illegible] and 17,711.)

Filed Feb. 20, 1901.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 165.

Browne, Manzanares & Company, Plaintiffs in error.
vs.
Francisco Chaves, Second, Defendant in error.

Filed December 11, 1899, Error to the Supreme Court of New Mexico.

No. 247

Browne, Manzanares & Company, Appellants.
vs.
Francisco Chaves, Second, Appellee.

Filed April 15, 1900, Appeal from the Supreme Court of New Mexico.

Brief on Behalf of Defendant in Error and Appellee.

BERNARD S. RODEY,
Attorney for Defendant in Error and Appellee.

ALBUQUERQUE JOURNAL-DEMOCRAT.

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OCTOBER TERM, 1900.

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Plaintiffs in error.
vs
Francisco Chaves, Second,
Defendant in error.

Filed December 11, 1899, Error to the Supreme Court of New Mexico.

No. 247

Browne, Manzanares & Company,
Appellants.
vs.
Francisco Chaves, Second,
Appellee.

Filed April 10, 1900, Appeal from the Supreme Court of New Mexico.

Brief on Behalf of Defendant in Error and Appellee.

BERNARD S. RODEY,
Attorney for Defendant in Error and Appellee.

STATEMENT OF THE CASE.

The two cases being one and the same, it is assumed that the first, which was taken up on writ of error, will be dismissed, and the second, which was taken up on appeal, retained.

But two questions were raised in the Court where the cause originated, one on defendant's plea suggesting the death of one of the plaintiffs, which was abandoned after a demurrer to it was sustained; and the other on plaintiffs' demurrer to defendant's plea of the statute of limitations to the writ of *scire facias* The Court overruled this demurrer, thus ending plaintiffs' cause of action. This is the only error assigned. It is a simple question of law, as to what is the proper construction to be placed upon a statute of New Mexico relating to the life of a judgment.

The facts of the case are, that on October 7, 1885, appellants recovered judgment in the District Court for Bernalillo County, New Mexico, against appellee for $4,170 damages and costs. Nothing was done with this judgment, not even to the extent of issuing an execution upon it for almost ten years thereafter, or until September 30, 1895, when a *praecipe* for *scire facias* was filed, a writ issued and service had. The defendant at once came in, and under the statute pleaded the age of the judgment in abatement, to which plaintiffs promptly demurrer. The Court overruled the demurrer.

The statutes referred to are as follows:

First: The act of January 23, 1880, compiled in 1884 as Sections 1860 and 1861, as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any court of record of any state or territory of the United States or the federal courts of the United States, within fifteen years."

Second: The act of February 10, 1887, compiled in 1897 as sections 3085-6, as follows:

"Sec.3085. That hereafter it shall not be necessary to bring proceedings in any Court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.

"Sec. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same;" and

Third. The act of February 24, 1891, which is a revision of, and substitute for the act of 1880 first aforesaid, and is as follows:

"Sec. 1. That so much of the laws of the Territory of New Mexico as is compiled as section 1861 of the Compiled Laws of the Territory of New Mexico of 1884, be and the same is hereby repealed, and the following be and the same is hereby substituted therefor:

"Sec. 2 (1861.) Actions founded upon any judgment of any Court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterwards,

and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal Courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: Provided, That actions may be brought upon any existing judgment which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." This latter Section 2, of the act of 1891, is compiled in 1897 as Section 2914.

As stated, no execution was issued upon the judgment after it was obtained, either within a year and a day thereafter under the common law rule, which was then in force in New Mexico, or under the five year statutory rule of the act of 1887 above quoted, or at all, even up to the time the attempt to revive it was made in 1895, when it was as stated, almost ten years old.

Appellee contends that under the act of 1891 aforesaid, the judgment was dead, and not simply dormant at the time it was attempted to revive it, and both of the New Mexico Courts agree with him.

The act of 1891 is a statute of limitation, and restricts the life of a New Mexico judgment to seven years from the date it became final; if it can be made to live for any greater length of time under the statute aforesaid, and this is doubtful, it must be through reviving it by scire facias or by a direct action of debt upon it, previous to the lapsing of the seven years, because if permitted to die a death of limitation, the

Court would have no power by any sort of proceeding over it.

Under the common law rule, for failure to have an execution issued upon it, within a year and a day, this judgment became dormant on October 8, 1886, and if it can be said that the act of 1887 was retroactive as to it, and revived it from its then dormant condition under the year and a day rule, then for lack of having had an execution issued upon it within five years from the date of its rendition, it again became dormant on October 7, 1890, and so remained until it died a death of limitation on October 7, 1892, or at least on February 24, 1893, under the one year proviso of the act of February 24, 1891, aforesaid. in 1895 when it was attempted to revive it by *scire facias* it had been dead under the seven year limitation for two and perhaps three years. But appellants contend that the judgment was simply dormant. after it became a year and a day old on October 8, 1896, and that under the common law rule, which gave all judgments life for twenty years, it could be revived at any time thereafter by *scire facias* or by direct action of debt upon it, within ninteen years (less a day); and that the only effect of the act of 1891 was to destroy the reviving remedy by action of debt, after the lapse of seven years, and leave the remedy by *scire facias* for the remainder of the time.

Appellants further contend that the word "actions" in the act of 1891, is not broad enough to include *scire facias*, which it is contended is not an ac-

tion at all, but a supplemental proceeding in the original suit.

However this may be in theory, the District Court below, on two hearings, as shown by the record, held the contrary and the Supreme Court of New Mexico also refused to take such a view of the statute, setting out its reasons fully sustained by authorities for so doing, in the following opinion:

OPINION OF THE COURT.

McFie, J.:

From the above statement of facts, it is apparent that the sole question for this Court to determine is whether or not the Court below erred in overruling the demurrer to the defendant's plea of the statute of limitations.

If the statute of limitations of the Territory runs against a proceeding by *scire facias* to revive a judgment, the demurrer to such plea was properly overruled and there was no error.

If the statute does not run against such action, the plea, of course, was an improper one, and it was error to overrule the demurrer thereto.

In determining this matter it is important to observe the difference between a dormant and a barred judgment.

A dormant judgment is one that has become inoperative as to its execution, but a barred judgment is one that is dead and cannot be enforced or revived over the objection of the judgment debtor.

At common law the life of a judgment was twenty years, but if an execution was not issued thereon

within a year and a day, the judgment became dormant and an alias execution could not issue thereon unless revived by *scire facias*.

The judgment, therefore, although it had become dormant, was not dead, as its life was twenty years. If the first execution was issued within a year and a day, it did not then become dormant; on the contrary executions might issue for its enforcement during its life of twenty years, unless it became dormant for some other reason—such, for instance, as death of the parties to it, or assignment, &c., when it might issue for its enforcement, notwithstanding its changed condition.

Freeman on Executions, sec. 81, says:

"Before any judgment is either satisfied or barred by lapse of time it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which it is revived. In this condition it is usually called a dormant judgment."

The writ of *scire facias* was adopted at common law as the proper means of restoring vitality to a dormant judgment before it was satisfied or barred by limitation.

Bingham on Judgments and Executions, 123 and 124, thus defines the writ of *scire facias:* "It is a writ issued out of a court wherein judgment has been entered or to which a record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue."

It is clear that at common law the proceeding by *scire facias* was not a new or distinct action, but simply a writ or process in the original suit for the sole purpose of securing the right to issue execution upon a dormant judgment prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and became barred by a statute of limitation.

In the early case of Ross vs. Duval, et al., 13th Peters, p. 44, the court was considering a case from Virginia. In that state the law provided that a judgment might be revived upon a motion in the nature of *scire facias*. The statute of limitation as to judgments was ten years. Duval, et al, had recovered a judgment against Ross, and when the judgment was about fifteen years old a motion was made for an execution to issue, and the motion being sustained, on appeal it was urged that the execution was illegally issued, because the statute of limitation of ten years had barred the judgment and all process upon it.

In construing that statute and its effect in that case the court said: "It is enough to know that the act of 1792 (((Virginia) imposes a limitation to actions and executions on judgments by which, like all other limitation laws of the state, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by *scire facias*, much less can an execution be issued upon it. Its vitality is gone beyond the reach of legal renovation."

This case did not arise under the common law, it is true, but under a statute. We refer to it, however,

as showing the construction of a statute of limitation and that its effect is to destroy the vitality of such judgments beyond the power of revival by *scire facias* or any other process.

Many other cases might be cited to the same effect but it is unnecessary.

The distinction between a dormant and a barred judgment is very clear, and with this in mind it is not difficult to understand the apparent conflict of authority found in the briefs of the respective counsel in this case.

The case of Smith vs. Stevens, 133 Ill., 183; 24 N. E. Rep., 511, is cited by plaintiffs in error to sustain their contention, wherein the court held that "although the statute of Illinois provided that the lien of a judgment should continue for only seven years, and that the judgment at that time should become *functus officio* as affecting the lands therein described, that nevertheless it might be revived by *scire facias*," &c.

In that case the Illinois statute provided that the life of a judgment should be twenty years, but that it ceased to be a lien on real estate in seven years. In other words, it became dormant as to the lien on real state in seven years, but could be revived by scire facias as to the lien during the remaining thirteen years of its life. It was a dormant, not a barred judgment.

The case of Murch vs. Moore, 2nd Oregon, 189, is not in point, because the court holds in that case

that a judgment is never barred under the laws of Oregon and may be executed until payment.

The common law, however, has been modified or set aside by statutory enactment in almost all the states and territories in regard to judgments and the limitation of action thereon.

While the right of action in debt and *scire facias* on judgments remain, other provisions are changed, and the authorities cited are not necessarily in conflict when the statutes upon which the decisions were rendered and the circumstances of each case are examined.

The proceeding to revive a dormant judgment in many of the states is by simple motion in the original cause, and execution is awarded by an order in the original case.

In such cases it is usually held that the order to revive does no more than reinvest the plaintiff with the right to have execution on his original judgment.

Marx vs. Sanders, 11 So. Rep., 764; 98 Ala., 500.

In that case the action of debt was held barred by the six years' statute of limitation, although the judgment had been once revived within its life.

In other states statutes provide, or are construed to mean that ***scire facias*** is an "action" within the meaning of the statute.

In Greenway vs. Dare, 6 N. J. Law, 306:

It was contended by counsel that the proceeding by ***scire facias*** was not an action or new proceeding, but a continuance of the original suit; but the court

held that "every scire facias is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In Howard vs. Randall, 5th Atlantic Rep., 403.

The court says: "Whatever, strictly speaking, may be the nature of *scire facias* on a judgment at common law, under our statute it is an action or suit within section 2130, R. L."

The plaintiffs in error contend that a *scire facias* proceeding is not an action within the meaning of the laws of New Mexico, sec. 1861, Comp. Laws 1884, sec. 2, chap. 53, Laws of 1891, and therefore is not barred by that section, while defendant in error insists that it is *an action* within the meaning of that section.

Section 1860, C. L. 1884, is as folllows: "The following suits or actions, may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

Sec. 1861 prior to amendment by laws of 1891 was as follows: "Actions upon a judgment of any court or record of any state or territory of the United States, or federal courts of the United States, within fifteen years."

By these sections a limitation of fifteen years attached to foreign judgments and, if that section did not also include local judgments, the common law limitation of twenty years, applied to them until section 1861 was amended by sec. 2, chap. 53, Laws of

1891, (compiled in 1897 as sec. 2914), to read as follows:

"Sec. 2 (1891). "Actions founded upon a judgment of any court of the Territory of New Mexico, may be brought within seven years from and after the rendition of such judgment, and not afterwards; and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the federal courts may be brought within seven years from and after the rendition of such judgment, and not afterward; provided, that actions may be brought upon any existing judgments which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred."

This section, as amended, applies to local judgments as well as foreign and federal, and fixes a positive limitation of right of action thereon at seven years, and specifically says, "and not afterwards." It is not denied that this limitation would bar an action of debt on a judgment, but it is insisted that the words "actions founded on any judgment," are used in a limited sense, and do not include proceedings by *scire facias* to revive a judgment.

We cannot so construe this language, as it was evidently used in its comprehensive sense and was intended to apply to all suits or actions which could properly be brought on a judgment. "Actions founded upon any judgment" are very comprehensive words, the word actions being in the plural, the language is equivalent to saying all actions the basis of which is a judgment!

To construe this language as plaintiffs in error contend for, would be to hold that an action of debt on a judgment could not be brought because it was barred by the statute in seven years, nor could any other suit be brought, but by *scire facias* the barred judgment may be revived and an execution issued upon it.

Such a construction is absurd and could not have been the intention of the legislature enacting the amendment.

The words "shall be forever barred," in the last line of the section, referring to stale judgments, emphasize the view that this section was intended to bar forever and render invalid all judgments more than seven years old, unless the proper steps had been taken to revive them.

This section was carefully drawn, as is shown by the proviso giving one year's time in which to revive stale judgments, referred to in the proviso.

In 1887 the legislature enlarged the time for issuing execution on judgments to five years. Sec. 2, chap. 61, Laws of 1887, reads as follows:

"Sec. 2. An action may issue at any time on behalf of any one interested in such judgment, referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing any action to revive the same."

It will be observed that the word "action" in that section is used in a liberal sense and refers directly to the proceedings to revive judgments.

The proceedings in this case showw all the characteristics of an action at law. The record shows that

a praecipe was issued for the writ, and the writ of *scire facias* was issued, which is declared to be the equivalent of a declaration. The writ was returnable, as other writs are; the defendant was ordered to show cause; pleas and demurrer were filed as in other cases; a judgment overruling the demurrer and dismissing the cause was entered, and plaintiffs in error have the *scire facias* proceedings not the original action, in this court seeking a review and reversal, and we see no reason why such proceedings should not be considered *an action* within the meaning of our statute.

The legislatures of many of our states have set aside the common law rule and made *scire facias* a new and independent action, and we are of opinion that the legislature of this territory accomplished the same purpose when the law of 1891 was enacted.

When the legislature declared that "Actions founded upon any judgment, unless brought within seven years, would be forever barred," it evidently intended that seven years was a reasonable time in which to revive them, and that after such time they should be beyond the power of legal renovation by any proceeding whatever, and this we hold to be the meaning and intent of section 1861 of the Com. Laws of 1884 as amended in 1891, and compiled in 1897 as sec. 2914.

"Statutes of limitation are now almost universally regarded favorably as statutes of repose, and liberally construed, and the older decisions to the contrary are disapproved."

Am. and Eng. Ency. Law, vol. 13, p. 692.

"Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, we think such debtor can appeal to the statute of limitation as a protection."

Glenn vs. Dorsheimer, 23 Fed. Rep., 095.

"And he cannot prevent the statute of limitations from running against him by a circuitous legal proceeding.

Glenn vs. Priest, ex'r, 28 Fed. Rep., 907.

Neither plaintiff nor defendant will be allowed to thwart the beneficial and healtful effect of the statute of repose by any mere strategy of legal proceeding.

Am. and Eng. Ency. Law, Vol. 13, (1st Ed.), p. 691.

"It would be a mere strategy of legal proceeding to hold that a judgment could be revived by a scire facias, although other actions thereon were barred, and we therefore hold that section 2914, Comp. Laws 1897, applies to proceedings by *scire facias* to revive judgments in this territory.

The judgment in this case was nearly ten years old at the time this action was brought, and no execution had ever issued upon it, so far as the record shows.

The bar of the statute was properly pleaded against it, and the demurrer was properly overruled.

The overruling of the demurrer to the plea of the statute of limitation and the dismissal of the cause being the only errors assigned, the judgment of the lower court is affirmed with costs.

JOHN R. McFIE,
Associate Justice.

We concur.

WILLIAM J. MILLS, C. J.
J. W. CRUMPACKER, A. J.
FRANK W. PARKER, A. J.
CHARLES A. LELAND, A. J.

Aug. 16th, 1898.

It will thus be seen that the supreme court of New Mexico unanimously held against appellants' contention, and it has since passed directly on this very act of 1891 as to foreign judgments and held not only that a seven year old foreign judgment was barred absolutely, but that any foreign judgment existing at the date of the passage of the act of 1891, however young, was, under the proviso, also barred in one year thereafter.

Stern & Krauss v. Bates, 9 N. M., (Gil.) 286.

A judgment that has died a death of limitation cannot be revived by scire facias, even though execution had been issued upon it during its life. This holding was made under statutes like ours.

Vick v. Chewning, 31 Miss., 201.

Stewart v. Justices (Mo.) 47 Fed. Rep., 482.

Siebels v. Hodges, 65 Ga., 245.

Mullikin v. Dewall, 7 Gil & J., (Md.) 355.

In examining the legislation of New Mexico, supra, and on seeing that the act of 1891 put local judgments (an honest and righteous act) upon the same footing as the judgments of sister jurisdictions,

one cannot get away from the conclusion that the language used means just what it says, "* * * actions founded upon any judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment and not afterwards. * * *"

The evident object of the legislation was to supply the omission as to local judgments in Section 1861 as it previously stood, and one cannot get away from the conclusion that the life of every judgment rendered in every court of this Territory is but seven years.

It is quite easy to understand the act of 1891, because there were many judgments then existing which were at the date of the passage of that act more than seven years old, and would therefore be barred save for th proviso giving them one additional year of life, within which they might be revived, and when the legislature said in the proviso "* * * and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred," it meant, of course, just what it said. It is utterly impossible to give the act in question any other construction.

It was contended below that to give the statute the construction here contended for would give our domestic judgments effect for no longer time than foreign judgments, but it appears to counsel for appellee that such would be an upright and honest act on the part of legislature to do so.

The proposition of law that statutes of limitation

affect the remedy and not the merits, is not denied here, but that question is not involved. Statutes of limitation are now regarded as statutes of repose, and "highly beneficiary to the community," and the day has passed when courts sought to suppress by all their ingenuity such a defense. See the comprehensive note on this subject in 13 Am. & Eng. Ency. of Law, pp. 692-3.

The citation by appellant of Section 444 of Freeman on Judgments, is against it wherein it says "it is form but not in fact a separate action," because it characterizes it as *an action*, and thereby shows the meaning of the word action in our statute. A reading of the chapter on *scire facias* in Freeman on Judgments beginning at Section 442, will easily convince this court that the rule in Pennsylvania and other states, in fact all of the states, is such that although *scire facias* may be said technically speaking, not to be a new suit, still such a proceeding is an action within the meaning of such an act as ours. The court can well see that if the demurrer in this case had been sustained and appellant had gone to trial it would get a new judgment with costs added, which would merge and bar the old judgment, and if it took execution or *scire facias* upon this new judgment, it would be for a greater amount than the old judgment, showing that in spite of all subtleties this proceeding is *an action* under our statute. It is numbered with a new number on the docket, and will proceed to judgment as an action.

It is wholly immaterial that there is in law

a difference between "an action" and *scire facias*, because if our legislature intended by the use of the word action to include scire facias, this court is bound to give that intention effect.

But scire facias is an action and has been held to be such in numerous cases.

Bryant v. Smith, 7 Coldw. (Tenn.), 113.

Kirkland v. Kreibs, 34 Md., 93.

Bilbo v. Allen, 4 Heisk. (Tenn.), 31.

Howard v. Randall, 58 Vt., 564.

Am. & Eng. Ency. of Law, Vol. 21, p. 856, notes and cases cited.

In the case of Potter vs. Tittcomb, 13 Me., p. 40, it is squarely held that *scire facias* is an action, and the court in that case stating the opposite view arguendo, says, "Dane holds *scire acias* on a judgment to be a mere continuance of the former action. In Underhill vs. Devereux, 2 Saund., 71, note 4, Sergent Williams states, that *scire facias* upon a judgment, is to some purposes, only a continuance of the former suit, and he cites Wright vs. Nutt, 1 T. R. 38, which was *scire facias*, brought merely to revive a judgment against executors." * * * Then the court says, after citing various authorities on that proposition, and distinguishing them, "in Atwood vs. Burr, 2 Saik., 603, *scire facias* against bail was declared a new distinct suit, and so it is regarded in 6 Dane, 463. In Clark vs. Paine, 11 Pick., 66, the court cites Dearborn vs. Dearborn, but says that there is

some force in the argument that a scire facias is an original writ, when a new party is brought into court. In Gonigal vs. Smith, 6 Johns, R. 106, which was *scire facias* to review a judgment, it was held to be a new action.

In Vol. 2, Sec. 505 of Coke upon Littleton, in commenting upon scire facias to revive a judgment after a year and a day, the author says that it is "[illegible] accounted in law to be in nature of an action," because the defendant might plead new matter to it, arising since the original judgment, and that therefore a release of "all actions would be a good bar to it," that was the language of Littleton, and Coke proceeds to add himself, that, "every writ whereunto the defendant may plead, be it original or judicial, is in law an action."

In Poulteney vs. Townson, 2 W. Black, 1277, the court held that a *scire facias* was upon principle a personal action; and this upon the authority of Littleton, Coke and Holt, who had given therefor an unanswerable reason, that the defendant may plead to it.

The same doctrine was recognized in Gray vs. Jones, 2 Wills., 251, and in Fenno vs. Evans, 1 T. R., 267. "And Sergeant Williams, in the note before cited says that as the defendant may plead to *scire facias* it is considered in law as an action, and in the nature of a new original. We are bound then upon authority to hold that the process before us (scire facias) is itself an action."

In the case of Howard vs. Randall, et al., from the Supreme Court of Vermont, reported in 5 Atl., 403

(supra,) it is held: "Scire facias under the provisions of the statutes of this state is an action within the provisions of R. L., Sections 2130-2141, and when one defendant dies with such an action pending against him and others, the action can proceed against the surviving defendants only."

The contention in that suit was as it is here, that *scire facias* was not an action within the meaning of their statute.

In the case of Greenway vs. Dare, 6 N. J. Law, p. 306, the court says: "Every scire facias is a new and independent action, referring to the former proceedings, but wholly distinct fom them."

In the case of Gonigal vs. Smith above referred to (6 Johns N. Y., 106), it was held that "* * * *scire facias* is a new action and requires a new warrant of attorney."

Appellant in its brief, page 18, says: "The statute (of 1891) does not expressly provide that no *scire facias* shall be had, or that no execution shall issue after seven years." Then what is the statute intended to accomplish? The answer is obvious, and the supreme court of New Mexico gave it in its opinion, supra.

It is respectfully submitted that no error was committed below and the decision of the supreme court of New Mexico should be affirmed.

B. S. RODEY,

Albuquerque, N. M., Att'y for Appellee.